



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 15 2010

THE ADMINISTRATOR

The Honorable Robert F. McDonnell
Governor of the Commonwealth of Virginia
1111 East Broad Street
Richmond, Virginia 23219

Dear Governor McDonnell:

Thank you for your letter of June 15, 2010, regarding the process for developing the Chesapeake Bay Total Maximum Daily Load (TMDL). I am pleased to hear that your first meeting of the Chesapeake Executive Council was a positive experience. I am also heartened by your commitment to strengthen Virginia's efforts to restore the Chesapeake. I look forward to working closely with you in the years ahead.

Your letter raised a number of important issues concerning the Bay TMDL and its implementation. I am also glad you had an opportunity to briefly share some of these concerns with my Deputy Administrator Bob Perciasepe at the meeting. Those specific concerns identified in your letter are addressed by topic in the enclosure.

We both share a profound commitment to restoring the Chesapeake Bay for the benefit of all people in the watershed. There is little question that we will confront difficult challenges in meeting this goal. The first Chesapeake Bay Agreement was signed in 1983 by the region's most senior elected and appointed officials. We have made significant progress since that time. However, we have fallen short in achieving our goals for controlling pollution. Working together, I am confident that we can change the course of history on the Chesapeake, providing a healthy and thriving future for all communities.

Thank you again for your letter and for your commitments on the Chesapeake. If you have any questions or concerns, please contact me or your staff may call Sarah Hospodor-Pallone, Deputy Associate Administrator for Intergovernmental Relations, at 202-564-7178.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa P. Jackson", is written over a horizontal line.

Lisa P. Jackson

Enclosure

ENCLOSURE

TMDL Schedule

In 2008, the Chesapeake Executive Council confirmed its commitment to establish the TMDL by December 31, 2010. We understand that meeting this deadline will be challenging, particularly with respect to some of the interim milestones that will need to be accomplished this summer and fall. However, we believe it is important to respect the commitment of our predecessors, while maintaining public trust in the work of the Chesapeake Executive Council.

Please understand that we share your concern about the delays that occurred earlier this year in sharing technical analyses among all Bay Program partners. However, we remain committed to assuring the utmost scientific integrity in our work. We have taken steps to prevent this from occurring again in the future.

Definition of “Reasonable Assurance”

We have sought to be clear in our communications with the states about our expectations for the TMDL and the criteria by which we would assess “reasonable assurance” for nonpoint source pollution control programs. However, we would welcome the opportunity to discuss this more thoroughly with you or your staff if you think that would be helpful.

In short, EPA has issued several national guidance documents on TMDLs and “reasonable assurance,” beginning in 1991. We also issued Chesapeake-specific expectations as recently as last November with a follow-up Guide issued to the jurisdictions this past April. Collectively, these documents describe the purpose and rationale for TMDLs and our “reasonable assurance” determination.¹ Again, we would welcome the opportunity to clarify any outstanding questions from the Commonwealth should that be necessary.

¹ U.S. Environmental Protection Agency Office of Water (1991). Chapters 1 - 3 in *Guidance for Water Quality-based Decisions: The TMDL Process*. EPA 440/4-91-001. April. Accessed at <<http://www.epa.gov/owow/tmdl/decisions/dec3.html>>; U.S. Environmental Protection Agency (1997). *New Policies for Establishing and Implementing Total Maximum Daily Loads*. Memorandum from Robert Perciasepe, Assistant Administrator, to Regional Administrators and Regional Water Division Directors, August 8, 1997. Accessed at <<http://www.epa.gov/OWOW/tmdl/ratepace.html>>; U.S. Environmental Protection Agency (2002). *Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992*. Accessed at <<http://www.epa.gov/owow/tmdl/guidance/final52002.html>>; U.S. Environmental Protection Agency (2009). Letter from William C. Early, Acting Regional Administrator, to L. Preston Bryant, Jr., Chair, Chesapeake Bay Program’s Principals’ Staff Committee. Accessed at <<http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/ResourceLibrary.html#keydocs>>; U.S. Environmental Protection Agency (2010). *A Guide for EPA’s Evaluation of Phase I Watershed Implementation Plans*. Accessed at <http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/GuideforEPAWIPEvaluation4-2-10.pdf>

Public Transparency

Together with our partners, we have implemented a robust public involvement process that has engaged literally thousands of stakeholders through hundreds of public meetings. We have enhanced traditional techniques with frequent and regular virtual meetings and internet accessible information as well. In addition, to support public involvement in the review of the draft TMDL in September, EPA, in partnership with the jurisdictions, will co-host more than a dozen public outreach meetings throughout the Bay watershed. We are working with your agencies to schedule four such events throughout the Commonwealth. Moreover, as part of frequent meetings of the EPA's Water Quality Goal Implementation Team, we have worked closely with numerous Virginia agency representatives and outside stakeholders as the TMDL and Watershed Implementation Plan development process has evolved. We would welcome additional thoughts as to how this process could be even more open and transparent.

Public Comment Process

The most recent meeting of the Principals' Staff Committee included a thoughtful discussion about the importance of providing sufficient opportunities for formal public comments. Based upon the concerns raised by the Commonwealth of Virginia and others, we have agreed to expand the comment period on the draft TMDL to 45 days, beginning September 24, 2010. EPA believes that 45 days, in combination with the extensive public outreach efforts during the summer and fall described earlier, affords the public ample time and opportunity to engage in the TMDL review process. EPA will ensure the public comment submission and review process is conducted in a complete, efficient and coordinated manner.

Chesapeake Bay Models

The Chesapeake Bay Program has invested significant resources over the past 30 years in developing the most sophisticated and scientifically-sound estuarine ecosystem models in the world. The current suite of models is now in its fifth generation. We have committed to make further refinements over the next year, in response to specific concerns expressed by our partners about two key parameters. To provide for these model refinements we have adjusted the TMDL schedule and process accordingly. On June 11, 2010 EPA communicated to the six states and the District our plans to implement a three-phase process to ensure the Bay TMDL development process builds in specific opportunities to adapt the Bay TMDL and the jurisdictions' watershed implementation plans to reflect the latest science and information.² Opportunities for adjustments are available in 2011 and 2017.

The collaborative work on the Chesapeake Bay models has strengthened the partnership over the past three decades. Scientists, regulators and policy makers from every jurisdiction have been involved in shaping these tools. At the same time, the models are just one of the many tools that we *all* use to guide our decisions. Indeed, we are fortunate

² U.S. Environmental Protection Agency (2010). Letter from Shawn M. Garvin, Regional Administrator, to Principals Staff Committee. Accessed at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/TMDLScheduleLetter.pdf

to have such a rich and diverse body of research and monitoring to inform the decisions we need to make on behalf of the people and communities in the watershed. The breadth of information available to the Chesapeake Bay Partnership is the envy of other restoration efforts around the nation and world.

The James River

Pollution to the James River, like all major tributaries to the Chesapeake, contributes to exceedances of water quality standards in the main portion of the Bay as well as in the local waters of the James. Given the physical size of the James watershed and the magnitude of its pollution loadings, the James River cannot be isolated from the rest of the Chesapeake Bay and its tidal tributaries. However, because of its proximity to the mouth of the Bay, its relative contribution to the impairments of the main portion is less than that of other major tributaries. The allocation process fairly reflects the lower relative contribution to tidal water quality impairments outside of the James River compared with other river basins to the north.

Working appropriately with the Commonwealth, EPA is committed to developing a TMDL that will protect and restore both the James and the Chesapeake Bay. Specifically, we have developed pollution allocations that will be sufficient to meet the Commonwealth's standards for chlorophyll a, dissolved oxygen, clarity and underwater grasses. As a practical matter, given the requirements of the 1999 consent decree, the commitments that EPA and the states have made over the past decade, and the James' contribution to Chesapeake, we have an obligation to develop this TMDL by December 31, 2010. Moreover, this TMDL will likely require significant reductions in nitrogen, phosphorus and sediment pollution to the River. The Bay TMDL's three-phase development process, as outlined in our June 11, 2010 letter, provides specific opportunities in 2010, 2011 and 2017 for incorporating new scientific understandings for continued restoration of the James River ecosystem.

Trust that we will work closely with you as appropriate to craft workable solutions to these vexing challenges.

EPA Consequences

EPA is committed to a strong partnership with the states. Together, we can and must succeed in achieving our shared goals of restoring the Chesapeake Bay and rivers. We have repeatedly made clear, and will continue to do so, that the states retain the primary responsibility in developing and implementing pollution control programs sufficient to achieve water quality standards in the Chesapeake Bay and tidal rivers. At the same time, in the unlikely event that the states are not able or willing to achieve these goals, the federal Clean Water Act defines a series of actions that EPA must take to protect water quality. We have sought to be as clear as possible about these backstop responsibilities in an earlier communication in December 2009.³ Again, it is not our intent to have to take these actions, but we are prepared, and obligated, to do so.

³ U.S. Environmental Protection Agency (2009). Letter from Shawn M. Garvin, Regional Administrator, to L. Preston Bryant, Jr., Chair, Chesapeake Bay Program's Principals' Staff Committee. Accessed at <http://www.epa.gov/region03/chesapeake/bay_letter_1209.pdf>

Funding

EPA is keenly aware of the current financial situation in the states, including the Bay watershed states. With the support of key Congressional leaders, we have almost doubled the funding levels for the Chesapeake Bay Program in the past two years, the majority of which is given as grants to the states. In 2010 the federal government has provided to Virginia \$2.6 million for the Chesapeake Bay Restoration and Accountability Program (CBRAP), \$2.3 million in Chesapeake Bay Implementation Grants, and \$1.2 million for water quality monitoring and data analysis grants. In addition, federal Farm Bill funding has grown dramatically. Today, the federal government is providing more funding for the Chesapeake than ever before.

Federal Executive Order

We would welcome the opportunity to talk with you and your staff more about the strategy developed under the President's Executive Order. We are not aware of any new requirements for local governments which stem from that Order. The federal government intends to work cooperatively with the states to develop actions and programs that respond to the Executive Order but will not create an undue burden for the states. For example, in developing a system for tracking voluntary conservation practices and other best management practices implemented on agricultural lands, the U.S. Department of Agriculture (USDA) and EPA intend to work with state and local partners to create an effective and efficient system that builds on current protocols for data submission to the EPA Chesapeake Bay Program Office.

In general, all levels of government and the private sector will face new challenges under the TMDL. We would appreciate the chance to hear some of your ideas about how we can implement the TMDL in the most efficient, cost-effective and timely manner.

Offsets to Accommodate Growth

EPA has provided flexibility to the Commonwealth of Virginia and the other Bay jurisdictions in developing and implementing a program designed to account for new or increased discharges of nutrients and sediment to the Bay and its tributaries. Jurisdictions can either set aside additional pollution loads to accommodate new or increased discharges from point and non-point sources, or they can develop and implement an offsets program. Emerging federal and state policies on offsets provide a unique opportunity to both reduce pollution and accommodate new growth. EPA already provided some early guidance to the states this past April as part of our Guide for how the agency will evaluate Phase I Watershed Implementation Plans.⁴ In the next two months, we intend to engage the Commonwealth and our other partners more directly in designing offset policies that will achieve multiple benefits. The Commonwealth is encouraged to enhance its existing trading program, as necessary, to address the offsets

⁴ U.S. Environmental Protection Agency (2010). *A Guide for EPA's Evaluation of Phase I Watershed Implementation Plans*. Accessed at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/GuideforEPAWIPEvaluation4-2-10.pdf

provision of the Bay TMDL. EPA is committed to including our draft offset expectations in the draft TMDL which will be issued in September 2010. Your senior staff will be contacted by EPA shortly.

Federal Reduction Commitments by Jurisdiction

EPA has committed to work with other federal agencies, states, and the District and local government partners to develop an accountability framework to track pollution reduction actions. As discussed during the Executive Council meeting, this information will be presented prominently on ChesapeakeStat (<http://stat.chesapeakebay.net/>) so the public and partners can easily access the data and understand the progress being made towards meeting commitments in the Watershed Implementation Plans and 2-year milestones. Specifically for agriculture, EPA has committed to work with USDA and the state and local partners to expand existing tracking and reporting systems for conservation practices, best management practices and treatment technologies by December 2011.

In most cases, nutrient and sediment reductions from federal activities will be credited in the state in which the activity was implemented. For example, USDA-funded activities to reduce nutrient and sediment loads from agricultural lands in the Commonwealth of Virginia will be credited to Virginia. This is consistent with USDA's commitment to assist states in implementing their Watershed Implementation Plans.

Compliance and Enforcement Activities

EPA is implementing a Chesapeake Bay Compliance and Enforcement Strategy throughout the watershed. Under the Strategy, EPA is identifying and addressing industrial, municipal and animal agricultural sources releasing significant amounts of nitrogen, phosphorous, sediment and other pollutants to the Bay in excess of amounts allowed by applicable federal environmental laws.⁵ We will continue to work closely with state agencies, local governments, interest groups and the private sector in implementing this strategy.

Our compliance assurance strategy for agriculture combines agricultural stewardship and compliance assistance with inspections, compliance monitoring and appropriate enforcement. Our focus is on intensive animal agricultural industries which result in large manure imbalances that have negatively impacted water quality in local surface waters, groundwater, and the Bay. Another critical objective of this compliance assurance work is the assessment of state agricultural programs.

Following on-farm inspections done in coordination with the states and extensive outreach to the farming community, we have issued several orders to farms in the watershed, including two in the Commonwealth. These actions are consistent with our strategy, which is designed to improve compliance with environmental laws and reduce nitrogen and phosphorus pollution to the Chesapeake Bay and its tributaries.

⁵ U.S. Environmental Protection Agency (2010). *Chesapeake Bay Compliance and Enforcement Strategy*. Accessed at < <http://www.epa.gov/compliance/civil/initiatives/chesapeake-strategy-enforcement.pdf> >